UNSW CENTRE FOR CONTINUING LEGAL EDUCATION

LITIGATION MASTER CLASS

27 FEBRUARY 2009

TOPIC 4: Pillars of litigation

OVERVIEW

Topic 4 of this seminar examines two components of litigation: orders and affidavits. This paper is an outline of the matters to be examined in the session scheduled from 12.05 pm to 12.45 pm, with a view to stimulating thought and promoting discussion, and not as definitive statement. Necessarily, the content and detail of the paper is constrained by the time available for the session.

Legal practitioners are cautioned to rely on their own research and enquiries to advise clients. This paper does not purport to be the first or last word on the matters examined. Legal practitioners will also be mindful of the evolving nature of the law, together with the importance of the relevant facts to determine outcomes in individual matters.

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A. The role of the administration of justice to resolve controversy

1. Society has an interest in finalising disputes for its wellbeing as an entity and the ongoing security of its individuals. Litigation is a means to that end, and not an end in itself. Litigation exists as a part of the administration of justice.

2. Our system for the administration of justice provides parties with the opportunity to agitate a controversy in an adversary manner in the neutral environment of a court with an independent decision maker ie: a judge, to resolve the dispute, by making **orders** to give effect to his or her decision.

B. What is an order?

3. The Shorter Oxford provides twenty-four meanings for the word "order" (from the Latin *ordin-, ordo*: row, series, rank etc) as a noun, and nine as a verb. They range from military to ecclesiastical to commercial to scientific uses, with a theme of regularising or methodical arrangement through organisation and control.

4. I shall use the word "order" as a noun meaning an operative judicial act.

5. The preferred outcome which a litigator seeks for a client is to persuade the decision maker (in this paper referred to as the "judge") to make the orders to grant the relief sought by the client (as opposed to the orders sought by the opponent) and thus to resolve the dispute in a manner favourable to the client.

6. For this reason careful conceptualisation and planning of strategy at the earliest stage, including formulating and articulating the optimal, but not overly optimistic, relief available is the sound way to achieve that outcome.

7. Ongoing reassessment during the agitation of the dispute is essential to reach the preferred outcome for the client, including changing and evolving the strategy, orders or relief sought and re-assessment of prospects of success.

8. The nature of an order may understood from three perspectives:

   (a) how it arises;

   (b) its purpose;

   (c) its effect.

C. Jurisdiction: the power of a court to decide

9. The source of power of a judge (ie the court) to make any order is the jurisdiction available to the Court. Different courts enjoy different jurisdiction. Inferior courts have jurisdiction to hear and determine disputes limited by:

   (a) the subject matter of the issue;

   (b) persons between whom the issue may be joined;

   (c) the kind of relief that may be granted.

10. The ample jurisdiction of the Supreme Court, including its inherent jurisdiction, to do all that is necessary for the administration of justice in New South Wales[1] and is unlimited.

11. By comparison the District Court, as an inferior court, is a statutory court with specific and limited jurisdiction conferred by Parliament[2]. The jurisdiction of an inferior court such as the Local Court of New South Wales also is limited by statute[3].

D. Distinction between order, verdict and judgment

12. The terms order, verdict and judgment often confuse.

13. An order is best understood to be the process by which a verdict and judgment are expressed by a court, but the term "order" also encompasses directions and other interlocutory or final determinations of a court.

14. A distinction is required between the expressed outcome of decision making process by juries as opposed to a judge alone, and between criminal and civil procedure terminology.

15. A verdict is the expression of a court's finding of facts. It is a term used to express the result of deliberations of a jury or the fact finding process in any trial, including by a judge sitting without a jury.

    Of itself a verdict does not resolve a dispute, and in any event until embodied in a judgment a verdict cannot take effect.

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[1] See *Supreme Court Act 1970* s23
[2] See *District Court Act 1973*
[3] See *Local Courts Act 1982* s7; see for its civil jurisdiction Part 7 Division 1

16. A judgment is the expression by a court of its determination as to the relief claimed in a civil suit in proceedings initiated by statement of claim, and is enforceable by writ of execution.

CP Act s90 Judgments generally

(1) The court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires.

(2) …

17. Furthermore, the court may enter judgment contrary to a verdict in favour of a party:

UCPR[4] r29.11 Judgment despite verdict, finding or assessment

If, at a trial with a jury, a verdict is given or a finding or assessment is made, the court may give judgment as it thinks fit despite the verdict, finding or assessment.

18. Thus where a plaintiff at trial persuades a decision maker of entitlement to relief, the court will give judgment in favour of the plaintiff, will make orders appropriate to the matters in dispute and will be guided by the relief claimed by the plaintiff. Alternatively, if unpersuaded by the plaintiff the court will give judgment for the defendant and make an order that the plaintiff's claim is dismissed.

19. By comparison, in proceedings commenced by summons, the determination of the judge will be expressed as orders, rather than as a judgment, often as a separate exercise after the judge delivers the court's reasons, and consequent decisions plus an invitation that "*Short minutes should be brought in to encompass my decisions*".

20. In essence, it is the orders made by the court that:

(a) brings to an end,

(b) expresses the court's determination of, and thus

(c) quells,

the controversy which is the subject of the dispute between parties.

[4] For convenience I shall refer to the *Uniform Civil Procedure Rules 2005* by the abbreviation UCPR.

E. Quelling controversy and finality of disputes

21. The purpose of the judicial system has been described by the High Court as:

"The 'unique and essential' function of the judicial branches is the quelling of controversy by the ascertainment of the facts and the application of the law. Once a controversy has been quelled, it is not to be relitigated."[5]

22. The recognition of the interest of society as well as the interest of the parties to achieve finality to disputes includes by force of Parliament:

CP Act[6] s91

(2)…if, following a determination on the merits in any proceedings, the Court dismisses the proceedings, or claim for relief in the proceedings, the plaintiff is not entitled to claim any relief in respect of the same cause of action in any subsequent proceedings commenced in that or any other Court.

23. This is an expression of the common law as stated in the following passage:

"*A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification or its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared.*."[7]

24. The effects and potential consequences arising from orders include:

(a) determination of rights, entitlements or obligations;

(b) enforcement, eg: writ of possession;

(c) *res judicata*;

(d) issue estoppel;

(e) appeal;

(f) contempt;

(g) professional misconduct.

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[5] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [43]
[6] For convenience I shall refer to the *Civil Procedure Act 2005* by the abbreviation CP Act
[7] *Blair v Curran* (1939) 62 CLR 464 at 531 per Dixon J; see also Spencer, Bower, Turner & Handley, Res Judicata, 3rd ed,

F. Legislation and rules relevant to orders

CP Act

25. The CP Act addresses the terms order and judgment in several provisions in a manner which suggests a degree of fluidity in the use of those terms, and consistent with achieving the *overriding purpose* of the Act to facilitate the just, quick and cheap resolution of the real issue in the proceedings.

CP Act s3 Definitions

judgment includes any order for the payment of money, including any order for the payment of costs.

CP Act s90 Judgments generally

(1) The court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires.

26. The powers conferred on courts by the legislature as to costs (see CP Act Part 7 and UCPR Part 42) allow a court to make orders as to whom, from whom, and what costs are to be paid, and on what basis such costs are to be assessed.

27. The power conferred on any court to which the CP Act applies to make costs orders against a party's legal practitioner, effectively by way of sanction in regard to the conduct of proceedings and notwithstanding the jurisdiction of the Supreme Court to regulate and supervise the conduct of legal practitioners, is broad, see **CP Act s99 Liability of legal practitioner for unnecessary costs**.

UCPR Part 36

28. Examination of the content of several of the rules contained in Part 36 "Judgments and orders" of the *Uniform Civil Procedure Rules 2005* provides insight and understanding as to the process and function of orders.

UCPR r36.1 General relief

At any stage of proceedings, the court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process or notice of motion.

UCPR r36.4 Date of effect of judgments and orders

(1) A judgment or order takes effect:

(a) as of the date on which it is given or made, or

(b) if the court orders that it not take effect until it is entered, as of the date on which it is entered.

(2) Despite subrule (1), if an order of the court directs the payment of costs, and the costs are to be assessed, the order takes effect as of the date when the relevant cost assessor's certificate is filed.

(3) Despite subrules (1) and (2), the court may order that a judgment or order is to take effect as of a date earlier or later than the date fixed by those subrules.

UCPR r36.6 Judicial notice to be taken of orders and undertakings

(1) In any proceedings, the court may take judicial notice of:

(a) any order made by the court, or by any other court, and

(b) any undertaking given to the court, or to any other court.

(2) In any proceedings, the court may be informed of an order or undertaking by (among other things) reference to:

(a) a note made by the judicial officer making the order or accepting the undertaking, or by his or her associate or by any other proper officer, or

(b) a note made by the registrar or other officer making the order or accepting the undertaking.

UCPR r36.11 Entry of judgments and orders

(1) Any judgment or order of the court is to be entered.

(2) Unless the court orders otherwise, a judgment or order is taken to be entered:

(a) in the case of a court that uses a computerised court record system, when it is recorded in that system, or

(b) in any other case, when it is recorded, in accordance with the practice of the court, as having been entered.

(2A) If the court directs that a judgment or order be entered forthwith, the judgment or order is taken to be entered:

(a) when a document embodying the judgment or order is signed and sealed by a registrar, or

(b) when the judgment or order is recorded as referred to in subrule (2), whichever first occurs.

(3) In this rule, …

(4) This rule does not limit the operation of rule 36.10.

UCPR r36.15 General power to set aside judgment or order

(1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.

(2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent.

UCPR r36.16 Further power to set aside or vary judgment or order

(1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.

(2) The court may set aside or vary a judgment or order after it has been entered if:

(a) it is a default judgment, or

(b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order, or

(c) in the case of proceedings for possession of land, it has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.

(3) In addition to its powers under subrules (1) and (2), the court may set aside or vary any judgment or order except so far as it:

(a) determines any claim for relief, or determines any question (whether of fact or law or both) arising on any claim for relief, or

(b) dismisses proceedings, or dismisses proceedings so far as concerns the whole or any part of any claim for relief.

(3A) If notice of motion for the setting aside or variation of a judgment or order is filed within 14 days after the judgment or order is entered, the court may determine the matter, and (if appropriate) set aside or vary the judgment or order under subrule (1), as if the judgment or order had not been entered.

(3B) Within 14 days after a judgment or order is entered, the court may of its own motion set aside or vary the judgment or order as if the judgment or order had not been entered.

(3C) Despite rule 1.12, the court may not extend the time limited by subrule (3A) or (3B).

(4) Nothing in this rule affects any other power of the court to set aside or vary a judgment or order.

UCPR r36.17 Correction of judgment or order ("slip rule")

If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error.

29. The UCPR Forms provide a precedent for orders in Form 43 (version 1) per UCPR 36.11 (see page 24).

G. Directions

30. Directions are akin to orders of the court however are made by the court for the purpose of effective case management. Similar principles apply to drafting directions for the effective prosecution of the client's case to achieve the preferred result, as with orders.

31. Sanctions for breach or disregard of directions include findings of contempt.

32. CP Act Part 6 brings together appropriate directions, however other gateway directions such as those found in UCPR Part 31 as to expert evidence, must be determined on a case by case basis.

33. There is no substitute for a careful scrutiny of the CP Act, the UCPR and Practice Notes relevant to the court determining each matter to identify the nature and content of appropriate directions.

H. Why orders matter

34. Three legal consequences of an order are to:

    (a) To define the outcome of the dispute once and for all;

    (b) To give rise to enforceable rights and obligations;

    (c) To subject parties to the threat of the coercive power of the state.

35. An order of a court must be obeyed unless and until it is set aside. The belief of a party affected by an order that it is irregular or even void is not justification for ignoring the decision and treating it as of no effect or operation in law.

36. The better approach to address any dissatisfaction with a judicial decision or order perceived to be infected with error is by the process of appeal.

37. Oliver Wendell Holmes Jr in extra-curial writing described the process in 1897:

> "*In societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees*."[8]..

38. Disobedience amounts to contempt, which may cause a court to exercise its powers to protect its processes, see SCR Part 55 – "Contempt".

I. Beyond the court making an order and correcting error

39. An appeal may lie from an order of a court. However no appeal lies from the reasons for the decision leading to the order.

40. It is only from the pronouncement found in the formal order of a court against which an appeal may be brought. Reasons for judgment may provide scope to identify error in the pronounced order, may explain the decision and have value as a precedent but they are not strictly the subject matter of the method of appellate review, unless the statute so specifies.

41. Mindful that the process of appeal is a creature of statute, the wise approach to considering an appeal is to refer to the relevant legislation as to the nature and extent the power of an appellate court to review an order, see as an example:

Supreme Court Act 1970 s75A - Appeal

(1) Subject to subsections (2) and (3), this section applies to an appeal to the Court and to an appeal in proceedings in the Court.

…

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires.

[8] "The Path of Law", 10 *Harvard Law Review* 457 (1897)

J. Conclusion on orders

42. Taking into account the above considerations the wise litigator will exercise great care and patience to frame the relief claimed to achieve his or her party's desired orders in the dispute.

43. Similarly, any orders by consent of the parties to be entered to resolve a dispute need to be drafted and settled with patience and care, to avoid ambiguity and to ensure that finality is achieved.

K. Purpose of affidavits

44. Courts quell actual disputes are founded on the facts relevant to the issues not hypothetical disputes.

45. A party proves the facts said to be relevant (and supportive) to his or her or its case by material admitted into evidence at the hearing.

46. It is useful to refer to the CP Act and to UCPR Part 31 "Evidence" and to Practice Notes for the relevant court to seek guidance as to procedure, and the *Evidence Act 1995* as to proof and admissibility of proposed evidence.

CP Act s3 "Definitions"

hearing includes both trial and interlocutory hearing.

trial means any hearing that is not an interlocutory hearing

UCPR r 31.1 Manner of giving evidence at trial

(1) This rule applies to a trial of proceedings commenced by statement of claim, or in which a statement of claim has been filed.

(2) Subject to subrules (3), (4) and (5) and to the provisions of the Evidence Act 1995, a witness's evidence at a trial must be given orally before the court.

(3) The court may order that all or any of a witness's evidence at a trial must be given by affidavit or, subject to rule 31.4, by witness statement.

(4) Unless the court orders otherwise, evidence of facts must be given by affidavit if the only matters in question are:

(a) interest up to judgment in respect of a debt or liquidated claim, or

(b) …

(c) costs.

(5) …

UCPR r31.2 Evidence of witnesses at other hearings

Subject to rule 31.1, evidence in chief of any witness at any hearing must be given by affidavit unless the court orders otherwise.

Evidence Act 1995 s55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

Evidence Act 1995 s56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

L. Substance of affidavits

"*Get your facts first and then you can distort them as much as you please.*"[9]

47. Success or failure in litigation is often determined at the earliest stage in the solicitor's office by taking detailed instructions as to the facts which give rise to a client's grievance. These first instructions are precious. They often provide the perspective to the dispute from which the judge will view the client's case.

48. Significant advantages may be gained by the careful distillation of evidence and presentation in an affidavit that brings certainty to a party's case which is usually unavailable when a witness' evidence at trial is given orally.

49. Today the process of persuasion commences much earlier than in the past, particularly as judges will often read affidavit evidence before coming on the bench and form a preliminary view as to the merits of each party's case.

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[9] *Oxford Dictionary of Quotations*, Mark Twain #30

CP Act s69 Affidavits and witness statements may be read in advance of hearing

Proceedings are not to be challenged, reviewed, quashed or called into question by reason only that the judicial officer or other person before whom the proceedings are being conducted has, prior to hearing, read any affidavit or witness statement that has been filed or lodged in the proceedings.

50. The substance of any affidavit evidence is determined by the use to which the affidavit is to be put. The test for the practitioner is how to put this motherhood statement into practice.

51. The key to success is to grasp the following matters in regard to the dispute:

    (a) the facts;

    (b) contemporaneous documents;

    (c) the operation of law on the facts;

    (d) the likely issues in dispute.

52. These matters inform as to what is "relevant evidence" to be included in the affidavit. Holmes provides a pithy example:

"*The reason why a lawyer does not mention that his client wore a white hat when he made a contract, …, is that he foresees that the public force will act in the same way whatever his client had upon his head.*"[10]

53. Effective affidavits have the following features:

    (a) the form of the affidavit complies with the rules;

    (b) the content of the affidavit is relevant to the issue in dispute;

    (c) the facts are set out in a chronological order;

    (d) direct speech rather than indirect speech is used;

    (e) submissions are not included;

    (f) speculation is not included;

    (g) the *jurat* is completed in accordance with legislative requirements.

[10] Supra FN 3

54. Useful guidance as to the process by which evidence is reduced to and presented in affidavit form may be found in the following sources:

(a) the commentary by Geoff Lindsay SC and Steve Jupp to UCPR Part 35 *Thomson Law Book New South Wales Civil Practice & Procedure: Uniform Civil Procedure*;

(b) *How to draft an Affidavit*, J Bryson QC (1985) 1 Aust Bar Rev 250-6;

(c) *Affidavits*, Bryson J (1999) Aust Bar Rev 166-72;

(d) *Civil Procedure Commentary and Materials*, 3rd Ed, Colbran & Ors, 2005, Butterworths Lexis Nexis.

M. Legislation and rules relevant to affidavits

55. It is essential for all litigators to have a working knowledge of UCPR Part 35, and Practice Notes for the relevant court. For convenience that part is set out in full below, and I have underlined specific areas to be addressed during the seminar as to the form, substance and use of affidavits.

UCPR r35.1 Irregularity does not invalidate affidavit

An affidavit may, with the leave of the court, be used despite any irregularity in form.

UCPR r 35.3A Heading to affidavit

The heading to an affidavit must include the name of the deponent and the date on which the affidavit is made.

UCPR r 35.4 Format of affidavit dealing with more than one matter

If the body of an affidavit alleges or otherwise deals with more than one matter:

(a) it must be divided into paragraphs, and

(b) each matter must, so far as convenient, be put in a separate paragraph, and

(c) the paragraphs must be numbered consecutively.

UCPR r 35.5 Alterations

If there is any interlineation, erasure or other alteration in the jurat or body of an affidavit, the affidavit may not be used, except by leave of the court, unless the person before whom the affidavit is sworn initials the alteration and, in the case of an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them.

UCPR r 35.6 Annexures and exhibits

(1) A document to be used in conjunction with an affidavit may be made:

(a) an annexure to the affidavit, or

(b) an exhibit to the affidavit.

(2) An annexure to an affidavit must be identified as such by a certificate endorsed on the annexure (and not on a page separate from the annexure) signed by the person before whom the affidavit is made.

(3) The pages of an affidavit, together with any annexures, must be consecutively numbered in a single series of numbers.

(4) An exhibit to an affidavit must be identified as such by a certificate attached to the exhibit entitled in the same manner as the affidavit and signed by the person before whom the affidavit is made.

(5) An exhibit to an affidavit must not be filed.

(6) If any other party so requires, a party who serves an affidavit to which a document is an exhibit:

(a) must produce the document for inspection by that other party, or

(b) must provide a photocopy of the document to that other party, or

(c) must produce the document at some convenient place to enable it to be photocopied by that other party.

UCPR r 35.7B Each page of affidavit to be signed

Each page of an affidavit must be signed by the deponent and by the person before whom it is sworn.

UCPR r 35.8 Affidavit of service not to annex copies of filed documents

(1) An affidavit of service of a document that has been served must clearly identify the document, but must not annex a copy of the document unless the document has not been filed.

(2) An affidavit of service must contain:

(a) a statement as to when, where, how and by whom service was effected, and

(b) a statement, using as nearly as practicable the actual words used by the person to whom the process was delivered, as to what, if anything, that person said, on the occasion of service, concerning the service or the subject matter of the proceedings, and

(c) a statement that the deponent is over the age of 16 years, or is of a named class of persons who by virtue of their status, occupation or otherwise must be over that age.

UCPR r 35.9 Filing of affidavits

Except by leave of the court, an affidavit must not be filed unless it is filed:

(a) in accordance with these rules, or

(b) in accordance with other rules of court applicable to the court in which it is filed, or

(c) in accordance with a practice note applicable to the court in which it is filed.

56. Attention to Practice Notes of courts is often rewarding to litigators:

PRACTICE NOTE SC Gen 4 Supreme Court – Affidavits

Commencement

1. This Practice Note commences on 17 August 2005.

Application

2. This Practice Note applies to the Court of Appeal, the Court of Criminal Appeal, and each of the Divisions of the Supreme Court.

3. This Practice Note does not apply to the Criminal List of the Common Law Division.

Definitions

4. In this Practice Note:

Tender bundle means a bundle of affidavits that a party intends to rely upon at a hearing (including an interlocutory hearing), whether previously filed or not UCPR means the Uniform Civil Procedure Rules 2005

Introduction

5. UCPR 35.9 provides that an affidavit may generally not be filed in proceedings except by leave of the Court. A rule may require an affidavit to be filed: UCPR 35.9(a) and (b); and see pars 8 and 16 below. UCPR 35.9(c) provides that affidavits may be filed in accordance with a Practice Note. The purpose of this Practice Note is to prescribe the procedures surrounding the use of affidavits in the Court.

Affidavits may not be filed without leave of the Court

6. As stated, an affidavit generally may not be filed in proceedings except by leave of the Court. An affidavit which has not previously been filed should be filed in Court at the hearing before it is read.

7. However, where an affidavit is to be read, unless it has already been filed and served (see UCPR 10.1), the party seeking to rely upon that affidavit must serve the affidavit on the relevant parties within a reasonable time before the hearing, unless the Court otherwise orders. See UCPR 10.2.

Proceedings in which Affidavits must be filed

8. Subject to any orders or directions of the Court, an affidavit must always be filed before it can be relied upon in the following types of proceedings:

- All proceedings in the Court of Criminal Appeal.
- All proceedings concerning the adoption of a child in the Equity Division.
- All proceedings in the Admiralty List of the Equity Division.
- All proceedings in the Corporations List of the Equity Division.
- All proceedings in the Probate List of the Equity Division.
- All proceedings in the Protective List of the Equity Division.
- All proceedings involving an appeal to the Court under UCPR 46.

Cross Examination

15. Parties should note the provisions of UCPR 35.2 in respect of the requirements of giving notice for the attendance of a deponent for cross-examination.

Specific exemptions under the Rules.

16. Notwithstanding this Practice Note, parties should note that certain provisions of the UCPR require the filing of an affidavit. These provisions include:

- UCPR 7.2 – Affidavit as to authority to commence proceedings.
- UCPR 12.2 – Affidavit where proceedings are discontinued.
- UCPR 14.23 – Verification of pleadings.
- UCPR 14.24 – Further affidavit as to verification of pleadings.
- UCPR 16.3 – Default judgment.
- UCPR 16.4 – Default judgment for possession of land.
- UCPR 16.5 – Default judgment for return of goods.
- UCPR 16.6 – Default judgment on liquidated claim.
- UCPR 16.7 – Default judgment on unliquidated claim.
- UCPR 16.9 – Default judgment for costs alone.
- UCPR 26.6 – Default of receivers.
- UCPR 27.3 – Certificate on sale of land.

- UCPR 31.26 – Direction for further evidence by an expert.
- UCPR 32 - *Evidence and Procedure (New Zealand) Act 1994* (Commonwealth).
- UCPR 36.8 – Judgment for possession of land.
- UCPR 36.10 – Filing of a certificate under the *Legal Profession Act 1987* or the *Legal Profession Act 2004*.
- UCPR 37.2 – Application for instalment order.
- UCPR 37.6 – Variation of an instalment order.
- UCPR 38.2 – Application for an Order for Examination.
- UCPR 39.3 – Application for Writ of Execution.
- UCPR 39.21 – Registration of Writ.
- UCPR 39.35 – Application for Garnishee Order.
- UCPR 39.45 – Application for a Charging Order.
- UCPR 43.2 – Stakeholder's interpleaded.
- UCPR 46.14 – Affidavits in respect of appeals.

N. Conclusion

57. Knowledge of and competence in:

    (a) drafting an effective order; and

    (b) making and the use of a probative affidavit;

    are fundamental forensic skills for successful litigation practice.

58. As with any specialised knowledge, facility arises from training, study or experience. A disciplined application of the matters considered above will ensure that these pillars of each case that you build remain functional to achieve the desired outcome for your client.

59. My thanks to the University of New South Wales Centre for Continuing Legal Education, its Director, Christopher Lemercier, for the opportunity to participate in this seminar, and to you, my fellow participants, thanks for your time and patience.

Mark Walsh
Barrister-at-Law
Seven Wentworth
27 February 2009

Form 40 (version 1)
UCPR 35.1

AFFIDAVIT OF [NAME] [DATE]

COURT DETAILS	
Court	
#Division	
#List	
Registry	
Case number	
TITLE OF PROCEEDINGS	
[First] plaintiff	**[name]**
#Second plaintiff #Number of plaintiffs (if more than two)	
[First] defendant	**[name]**
#Second defendant #Number of defendants (if more than two)	
FILING DETAILS	
Filed for	**[name]** [role of party eg plaintiff]
#Filed in relation to	[eg plaintiff's claim, (number) cross-claim] [include only if form to be eFiled]
#Legal representative	[solicitor on record] [firm]
#Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]

[on separate page]

AFFIDAVIT

Name

Address

Occupation

Date

I [#say on oath #affirm]:

1 #I am [role of deponent].

2 [state information to be included in the affidavit in numbered paragraphs].

#SWORN #AFFIRMED at

Signature of deponent

Signature of witness

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

(my emphasis)

Form 43 (version 1)
UCPR 36.11

JUDGMENT/ORDER

COURT DETAILS

Court

#Division

#List

Registry

Case number

TITLE OF PROCEEDINGS

[First] plaintiff	**[name]**
#Second plaintiff #Number of plaintiffs (if more than two)	
[First] defendant	**[name]**
#Second defendant #Number of defendants (if more than two)	

DATE OF JUDGMENT/ORDER

Date made or given

Date entered

TERMS OF JUDGMENT/ORDER

3 [ ]

4 [ ]

SEAL AND SIGNATURE

Court seal

Signature

Capacity

Date

[Include the following section if the document is to be provided to the Registrar for sealing under UCPR 36.12.]

#PERSON PROVIDING DOCUMENT FOR SEALING UNDER UCPR 36.12

Name	**[name]** [role of party eg defendant]
#Legal representative	[solicitor on record] [firm]
#Legal representative reference	[reference number]
Contact name and telephone	[name] [telephone]

[on separate page]

[Include only if more than two plaintiffs and/or more than two defendants and/or any cross-claims.]

#PARTY DETAILS

PLAINTIFF['S][S'] CLAIM

Plaintiff[s]	**Defendant[s]**
[name] [role of party eg first plaintiff]	[name] [role of party eg first defendant]
[repeat as required for each additional plaintiff]	[repeat as required for each additional defendant]

#[FIRST] CROSS-CLAIM

Cross-claimant[s]	**Cross-defendant[s]**
[name] [role of party eg first cross-claimant to first cross-claim]	[name] [role of party eg first cross-defendant to first cross-claim]
[repeat as required for each additional cross-claimant]	[repeat as required for each additional cross-defendant]

[repeat as required for each additional cross-claim]

JAMES HARDIE & COY PTY LIMITED .... APPELLANT;
DEFENDANT,

AND

SELTSAM PTY LIMITED .... RESPONDENT.
DEFENDANT,

[1998] HCA 78

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

H C OF A 1998 — Oct 6; Dec 21 1998

Gaudron, McHugh, Gummow, Kirby and Callinan JJ

Tort — Joint tortfeasors — Contribution — Judgment entered in favour of one defendant by consent of plaintiff — Whether tortfeasor against whom judgment entered precluded from claiming contribution from that defendant — Law Reform (Miscellaneous Provisions) Act 1946 *(NSW), s* 5(1)*(c),* (2).

Section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) provided that where damage was suffered by any person as a result of a tort "any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage". Section 5(2) provided that the amount of the contribution recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage".

A plaintiff sued three defendants as concurrent tortfeasors in the Dust Diseases Tribunal of New South Wales. Two of the defendants cross-claimed against each other for contribution under s 5(1)(c). Consent judgments were entered after the commencement of the trial in favour of the plaintiff against two defendants and judgment was entered for the third defendant against the plaintiff with no order as to costs. Before the judgments were pronounced, counsel for one of the defendants against whom judgment was to be entered stated that his client did not consent to judgment in favour of the third defendant against the plaintiff; that he could not be heard in relation to that; but that that judgment would not impede his client's claim for contribution against the third defendant. The judge agreed and said that he would hear the cross-claim later. Before the cross-claim was heard, the third defendant obtained an order from the Tribunal, differently constituted, striking out the cross-claim for contribution on the basis that the entry of judgment in its favour meant that it was not liable to the other defendant.

Held, by Gaudron, Gummow and Callinan JJ, McHugh and Kirby JJ dissenting, (1) that the third defendant was not a joint tortfeasor who was liable with the other defendant in respect of the damage suffered by the plaintiff within s 5(1)(c) because the entry of judgment in favour of the third defendant established that it was not liable to the plaintiff and thereby absolved it from liability to the other defendant.

(2) That since the third defendant had been sued by the plaintiff and the plaintiff's action had been brought to an end by a final order the third defendant was not a person yet to be sued for the purposes of s 5(1)(c).

Accordingly, the other defendant had no entitlement to contribution against the third defendant under either limb of s 5(1)(c).

Brambles Constructions Pty Ltd v Helmers (1966) 114 CLR 213 at 218-219, applied.

Per Gaudron, Gummow and Callinan JJ. The consent judgment of the Tribunal, as a court of record, in favour of the third defendant was no less effective to absolve it from liability in the contribution proceeding than if the judgment had been given after a trial. It was for the other defendant to take steps to oppose the entry of judgment and put itself in the position to appeal against that. The other defendant had a right to be heard before consent judgment was entered in favour of the third defendant. As the judgment remained on the record, neither limb of s 5(1)(c) was satisfied.

Per McHugh and Kirby JJ (dissenting). Because the other defendant did not consent to the judgment in favour of the third defendant the entry of that judgment did not deprive it of the right to claim contribution under s 5(1)(c).

Decision of the Supreme Court of New South Wales (Court of Appeal): *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1997) 15 NSWCCR 247, affirmed.

John Gannon brought proceedings in the Dust Diseases Tribunal of New South Wales (the Tribunal) claiming damages in respect of diseases suffered by him allegedly arising from the inhalation of asbestos dust and fibre over many years at work. He sued his employer, the Electricity Commission of New South Wales (Elcom), and two manufacturers and suppliers of asbestos products, James Hardie & Coy Pty Ltd (James Hardie & Coy) and Seltsam Pty Ltd (Seltsam). The Tribunal was established as a court of record and had exclusive jurisdiction to hear and determine such proceedings (1). On the second day of the hearing before Judge Johns, James Hardie & Coy and Seltsam each filed cross-claims against the other claiming contribution were it found liable to Mr Gannon. Later that day a settlement was reached between Mr Gannon and each defendant. Terms of settlement between the plaintiff and James Hardie & Coy and Elcom were handed to the judge. They provided that they were not to be disclosed other than in proceedings for contribution. Mr Gannon also settled with Seltsam. Counsel for the parties handed an "Order for Judgment" to the judge. It provided that James Hardie & Coy was to pay the plaintiff $340,000 with each party to pay his or its own costs, Elcom was to pay the plaintiff $120,000 with each party to pay his or its own costs, and for verdict and judgment for the third defendant against the plaintiff with no order as to costs. Before the judge signed the document and affixed the seal of the Tribunal,

(1) *Dust Diseases Tribunal Act* 1989 (NSW), ss 4, 10.